

## PRINCIPLED DECISION-MAKING AND THE SUPREME COURT

M. P. GOLDING\*

Times change and with them the fashions, even fashions in legal thinking. In the not too distant past, some of the most respected voices among our legal theorists called for a less “legalistic” law and minimized the role of “logic” and “reason” in the judicial process. It is not clear how representative of the legal community the proponents of such views were; they seemed to have regarded themselves as voices crying in the wilderness. Nor is it always clear, to me at least, what it was that was being attacked and what it was that was being advanced. Yet it is not uncommon for these views to be taken as the typical American contribution to jurisprudence. Although no American can fail to be influenced in some measure by these conceptions, it is interesting to notice that some of our most distinguished writers have called for a return to reason in law, especially in high places, *i.e.*, the Supreme Court.

Perhaps this is the “inevitable reaction, long overdue.”<sup>1</sup> Even Judge Arnold, whose hard-boiled realism and rapier-like style have suffered no decline, seems to accept “reason” as an “ideal.” He has, nevertheless, severe reservations that “reason would replace the conflicting views now present on the Court if the Court had more time for the ‘maturing of collective thought.’”<sup>2</sup> Whether the Court is overworked is a question that probably can best be answered by the demigods who inhabit our Mt. Olympus, and whether diminishing its workload will result in opinions grounded more in reason and principle is certainly problematical. Few would deny that such a result is desirable; however, it is no easy task to formulate the nature of such opinions or the criteria whereby we could determine whether such a result had been achieved.

A notable undertaking along these lines is the Holmes Lecture of Professor Herbert Wechsler.<sup>3</sup> This lecture has already occasioned a minor literature, in part focusing on matters of interest to constitutional lawyers<sup>4</sup> and in

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\* Assistant Professor of Philosophy, Columbia University.

1. Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 654 (1961).

2. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1312 (1960). See also Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960); Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

3. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted, with some introductory remarks, in WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3-48 (1961) [hereinafter cited to the book as WECHSLER].

4. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Heyman, *The Chief Justice, Racial Segregation and the Friendly Critics*, 49 CALIF. L. REV. 104 (1961); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

part focusing on matters of a more theoretical nature.<sup>5</sup> Although its main thrust may be of a more practical scope, no one can deny that Professor Wechsler's lecture raises important issues of jurisprudence and legal philosophy.<sup>6</sup> In what follows I shall attempt to deal with some of these issues. Notwithstanding their broad scope, I shall in general confine myself to the Supreme Court, partly because Professor Wechsler so restricts himself, but mainly because it occupies a special position in our legal system—a position which, I shall try to show, makes it particularly susceptible to the demands he makes of it.

### I. NEUTRALITY AND PRINCIPLED DECISION-MAKING

If I do not misinterpret Professor Wechsler's lecture, my approach to these issues differs somewhat from his. Nevertheless, I believe that without overstretching Professor Wechsler's language what I have to say can be fairly found in it; therefore, I shall follow the main lines of his exposition. The differences between our approaches to these great issues of legal philosophy—if there really are any differences—arise from my difficulty in comprehending the meaning of the expression "general and neutral principles of law." In one place, Professor Wechsler speaks of "generality" and "neutrality" as "surely the main qualities of law."<sup>7</sup> Surely Professor Wechsler is not here endorsing Austin's exclusion of particular commands from the realm of law.<sup>8</sup> Although it may be that generality and neutrality are in *some* sense

5. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960).

6. I do not think that the full significance of Professor Wechsler's ideas has been exhausted by the critical articles I have seen. The article by Mueller & Schwartz, *supra* note 5, is a helpful one. I cannot feel the same about the article by Miller & Howell, *supra* note 5. My paper was completed before the publication of Dean Rostow's Coen Lecture in which Professor Wechsler is subjected to severe criticism. See Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123 (1962). I think that my paper goes some way toward clarifying some if not all of the issues that he raises. Admittedly, the nature of principled judicial decision is a complex topic; many of its facets are hardly touched here. Regarding Dean Rostow's article, I shall make only a few remarks. First, I do not think that the model of principled decision that I outline—and which I think is the nub of Professor Wechsler's view—is at all identical with "mechanical jurisprudence." Secondly, even Dean Rostow implies, but does not make explicit, various standards that ought to control the *procedures* of his "result-oriented" jurisprudence. It would seem that the explication of those standards would follow the lines that I present here. Thirdly, it is "results" that we expect from the courts; not mere results, however, but *just* results. We cannot understand this except in terms of "principle."

7. WECHSLER 23.

8. See AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND USES OF THE STUDY OF JURISPRUDENCE* 24 (Berlin, Hampshire & Wollheim ed. 1954):

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts of forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

*Ibid.* Austin gives the following example:

inherent in the very concept of law, whereby we distinguish a legal order from a lawless tyranny, not each and every rule of law need be "general" and "neutral." It is, in fact, impossible to tell by inspection of a given legal rule or principle,<sup>9</sup> in isolation from the context of its application, whether it is "neutral" or "general" in any significant sense. Trivially, almost every legal rule is "general" and there are also levels of generality.<sup>10</sup> Scores of legal rules, purposely designed to favor one party or group over another, are "un-neutral" with respect to social advantage. Since mere inspection does not reveal whether a rule or principle is "general" or "neutral" in the sense required by Professor Wechsler's argument, the key to neutrality and generality must be found elsewhere.<sup>11</sup>

This key is to be found in the *process* or *procedure* of judicial decision-making. The question that uncovers these qualities is: what are the distinguishing characteristics of principled decision-making?<sup>12</sup> I shall attempt to answer this question in outline and, in so doing, indicate how generality and neutrality are built into the very concept of "principled decision-making." I do not think that this is so remote from what Professor Wechsler intends, for in a number of places he speaks of "principled decision" as embodying his notion of neutral principles of law. That he has in mind also the process or procedure of judicial decision-making may be seen from his contrast between "courts of law" and a "naked power organ."<sup>13</sup>

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If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of acts being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature.

*Id.* at 20. Compare Kelsen's remarks:

But there is no doubt that law does not consist of general norms only. Law includes individual norms, i.e., norms which determine the behavior of one individual in one non-recurring situation and which therefore are valid only for one particular case and may be obeyed or applied only once. Such norms are "law" because they are parts of the legal order as a whole in exactly the same sense as those general norms on the basis of which they have been created.

KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 38 (1946); see Golding, *Kelsen and the Concept of "Legal System,"* 57 *Archiv für Rechts-und Sozial-Philosophie* 355 (1961).

9. "Rules" and "principles" are often distinguished, but I shall not overcomplicate my exposition by doing so here.

10. Mueller & Schwartz, *supra* note 5, at 577, quite correctly drives home the question, "how general is general?"

11. Professor Wechsler quite rightly rejects "impartial," "disinterested," and "im-personal" as substitutes for his adjective "neutral." WECHSLER xiii. What is of crucial interest to the community is not what the judge *feels* about the parties or the case before him, although this is not unimportant, but rather how he administers the law. There are standards of judicial impartiality.

12. The specific question which Professor Wechsler poses is: "what, if any, are the standards to be followed in interpretation [?] Are there, indeed, any criteria that both the Supreme Court and those who undertake to praise or condemn its judgments are morally and intellectually obligated to support?" *Id.* at 15-16. The *kind* of answer which he gives is interesting. He does not say what these standards or criteria are, but rather tells us something *about* them, namely, they must be "general" and "neutral." The approach, then, is "formalistic," although he assumes a background of democratic values.

13. *Id.* at 27.

A. *The Analogue in Moral Philosophy*

The above question has its analogue in the history of moral philosophy. To be sure, there are differences between moral and legal reasoning; however, the similarities, especially in regard to Professor Wechsler's treatment of judicial neutrality, are sufficient to justify a brief discussion here. One can not disregard the fact that Professor Wechsler elaborates his ideal of the judicial process within the scope of the broad ethical conceptions of political theory.

In no analysis of moral notions does principle play a greater role than in Immanuel Kant's. He rejected the view that the rightness or wrongness of an act is determinable by a straightforward reference to its consequences. The "moral value" of an act, says Kant, "does not depend on the reality of the object of the action but merely on the principle of volition by which the action is done without any regard to the objects of the faculty of desire."<sup>14</sup> Rather, two of the necessary constituents of a morally right action are: (1) that it be done on principle; and (2) in conformity with a principle.<sup>15</sup> Not every putative principle, however, is a genuine moral principle. It is the function of the various formulations of the Categorical Imperative to serve as a test of putative principles.

It would be out of place to give here an extended account of Kant's ethical theory, a theory not without its serious difficulties. For my present concerns we need consider only a few points. In developing his conception of a genuine moral principle Kant appeals to a very simple consideration. Every moral decision makes a universal claim: if an act is right for me, it must be right for every similarly situated person. For me arbitrarily to make an exception of myself is clearly the very negation of principle.<sup>16</sup> So also, to distinguish some individual, or class of individuals, arbitrarily and thus claim that it is right for me to treat him, or them, differently from the way I treat others, is the very *negation* of principle. To act in such ways is not to act on principle or in conformity with a principle, and to decide to act in such ways is not to make a principled decision. What Kant is doing in developing his notion of a genuine moral principle is to build into it—or rather show how there are built into it—the notions of generality and neutrality in one of their modes.

The obvious question elicited by Kant's view is: what are reasonable grounds for difference of treatment? This question raises a tremendously difficult problem for Kant. Most people would say that in determining

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14. KANT, *Foundations of the Metaphysics of Morals*, in *CRITIQUE OF PRACTICAL REASON* 61 (Beck ed. 1949).

15. Kant also requires that it be done for the sake of principle, *i.e.*, out of a sense of duty. But this is not relevant here.

16. How this statement is related to the idea expressed in the previous sentence need not concern us here. See generally Edgley, *Impartiality and Consistency*, 37 *PHILOSOPHY* 158 (1962); Monro, *Impartiality and Consistency*, 36 *id.* at 161 (1961).

whether I am permitted to make an exception of myself or some other individual in a given case it is legitimate to appeal to the consequences that my action would have; but this way is barred to Kant. Nevertheless, Kant's notion is not without its practical importance, for it throws a "definite *onus probandi* on the man who applies to another a treatment of which he would complain if applied to himself . . . ." <sup>17</sup> It is important, also, to recognize the scope of Kant's notion: it is not restricted to differences made in respect of *persons*. Rather, it applies equally to *circumstances* or situations. Thus, moral action, or principled moral decision-making, must not only be "impartial" with respect to persons, but also must be "impartial" with respect to similar circumstances. No putative principle of action can be a genuine moral principle if it allows me to act differently in similar circumstances, unless a significant distinction between the circumstances can be shown to exist. Here again, the *onus probandi* falls on the person who would make such a distinction. As a consequence, consistency, in one of its modes, is built into the concept of principled moral decision-making.

It is evident that, for Kant, one's mere likes and dislikes cannot be the ground of moral action or principled moral decision-making. But insofar as Kant pretends to be analyzing our common moral notions, I think that he goes wrong in believing that our likes and dislikes, or as we should say now, our values, are irrelevant to moral action and principled decision-making. <sup>18</sup> Nevertheless, he is correct in his rejection of *mere* likes and dislikes as the basis of morality.

The same rejection is found in Bentham, whose utilitarian moral philosophy is quite different from Kant's. The principle of sympathy and antipathy, namely, "that principle which approves of certain actions . . . merely because a man finds himself disposed to approve or disapprove of them" is

a principle in name [rather] than in reality: it is not a positive principle of itself, so much as a term employed to signify the negation of all principle. What one expects to find in a principle is something that points out some external consideration, as a means of warranting and guiding the internal sentiments of approbation and disapprobation: this expectation is but ill fulfilled by a proposition, which does neither more nor less than hold up each of those sentiments as a ground and standard for itself. <sup>19</sup>

Thus, Bentham, whose universalistic ethical hedonism assigns to likes and

17. SIDGWICK, *THE METHODS OF ETHICS* 380 (6th ed. 1907); cf. WECHSLER 155 (remarks on the issues of the Nuremberg Trial).

18. There certainly are occasions when it would be silly to say that one ought not take one's likes and dislikes into account. As has often been pointed out, it would generally be foolish for a man to ignore his likes and dislikes in deciding whether to marry a certain woman. Kant might hold, however, that such a decision is morally neither right nor wrong; but it is not difficult to think of situations in which a couple might have an obligation to marry, according to Kant.

19. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 15-16 (1823 ed.).

dislikes a central role in moral judgment, is at one with Kant in rejecting the method of *ad hoc* evaluation.

In operating the hedonic calculus, Bentham tells us that we must "take an account of the *number* of persons whose interests appear to be concerned . . . ."<sup>20</sup> In so doing, each person is to be considered impartially. "Each is to count for one, and no one for more than one." Bentham nowhere justifies this impartiality. Clearly, it is not deducible from the Principle of Utility (the greatest happiness principle). Rather, he assumes it, because without it the Principle of Utility would not be a principle at all. Part of the meaning of principled decision-making is that persons or similar circumstances are to be treated in the same manner, unless a relevant distinction is shown to exist.

#### B. *The Characteristics of Principled Decision-Making*

In what follows I shall develop more fully the nature of principled decision, but it may be useful to summarize a few of its salient features at this juncture. A decision or judgment is principled only when it is guided by some "external consideration," *i.e.*, a guiding principle that contributes to the deliberation on the case. Such a principle is a *reason* (or part of the reasons) for the decision. It cannot be a reason for the decision unless it determines, at least to some extent, the outcome of the process of deliberation. This means that a principle cannot be so flexible as to allow for free-wheeling discretion. Furthermore, in applying a principle, the instant case must be treated as an instance of a more inclusive class of cases, *i.e.*, the case at hand is treated in a certain manner because it is held to be proper to treat cases of its type in that manner. In this way every principled judgment makes, or rests upon, a universal, or general, claim. When the given case is treated differently from the way in which it is held to be proper to treat cases of its type the decision-maker is required to distinguish it from these cases. Here, too, such distinctions must be drawn in a principled way: it is not sufficient to justify the different treatment of persons or circumstances simply on the ground that one is dealing with one person or circumstance rather than another. That is to say, in principled decision-making one is permitted to make exceptions of this sort only insofar as they fall within a class of cases considered appropriate for the different treatment.

Although the nature of distinction-making in principled decision-making is a complex topic deserving separate, detailed treatment, brief discussion about it is in order here. First, it is obvious that in many cases people disagree on whether there exist significant enough differences between apparently similar persons or circumstances to permit their being treated in disparate ways. But this fact in no way affects the account of principled decision I am

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20. *Id.* at 31.

presenting. This account does not assume or require that people agree in their judgments. It is quite consistent with it that two parties should be opposed in their judgments and yet both be principled. Second, when such distinctions are made, the criteria for determining which differences are significant or relevant must be drawn in a principled way.<sup>21</sup> Not just *any* distinction—which can always be found—will do.

Briefly put, the requirements for principled decision are: (1) that a reason for the disposition of the case be given; and (2) that the case be so decided because it is held to be proper to decide cases of its type in this way. It is in the meeting of the requirements for principled decision that the qualities of neutrality and generality are achieved. Naturally, I have presented them only in their barest outline. To do more would be to broach the most intricate problems in the analysis of moral reasoning. I have also formulated these requirements in a most general and broad way, so as to be acceptable to a wide variety of moral theories. It is worth mentioning that these requirements are part of a minimal analysis of the concept of "distributive justice."

It is important to recognize the fact that the above requirements constitute necessary conditions of a principled decision. I do not doubt that more is required in order to explicate the notion of a *justified* decision. It is especially important to recognize that I have been discussing the way one ought to go about justifying a judgment, and not the psychological process of reaching a judgment.<sup>22</sup> One's decision is principled if one supports it by reasons or reasoning of this kind. Of course, in situations in which people are expected to make principled decisions it is expected that the psychological process will accord with the above procedures. (It is what we expect of a principled man.) And it seems to me that this does happen at least sometimes. On the other hand, even when a decision is a so-called "guts reaction" it might be a mistake to underrate the role of these procedures, for they may have been "internalized."

From the above delineation of principled decision-making it follows that the typical kind of argument that will be employed in both deliberation and criticism is that of *reductio ad absurdum*. One's judgment is "tested not only by the instant application but by others that the principles imply."<sup>23</sup> When a principle is advanced in support of a decision and this principle would necessarily permit some given case to be treated in a manner different from the way in which by hypothesis it must be treated, one is forced either to distinguish the cases or, failing this, to reject the principle. Rationality, of which principled decision is an element, requires pragmatic consistency of this sort.<sup>24</sup>

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21. See Mueller & Schwartz, *supra* note 5, at 578-80.

22. See generally WASSERSTROM, *THE JUDICIAL DECISION* 26-38 (1961).

23. WECHSLER 21.

24. Another way of attacking the reasoning behind a judgment is to call into question the alleged facts that it supposes; but I am not concerned with this here.

Obviously, one's decisions lose their moral force when we indulge in inconsistency. Professor Wechsler quite correctly characterizes the criteria of principled decision as ones which we are "morally and intellectually obligated to support."<sup>25</sup>

In contrast with principled decision-making is the method of *ad hoc* evaluation. Professor Wechsler gives numerous examples from our constitutional politics, past and present, of the *ad hoc* type of evaluation. Whether, and in what circumstances, this method is to be deplored is beyond the scope of this paper. The analysis of principled political decision-making is, of course, a complex topic. The factor of *compromise*, which plays such an important part, would seem to add another dimension to the treatment that has been given so far. I recognize that compromise may also be an element in judicial decision in a number of ways, but this would require separate consideration beyond the scope of this article.

## II. PRINCIPLED JUDICIAL DECISION-MAKING

Previously, I alluded to the fact that principled judicial decision-making is both similar to and different from principled moral decision-making. The truth of the matter as I see it is that with two provisos principled judicial decision is formally congruent with principled moral decision. The two provisos are, first, that a legal system is able to stipulate in a large measure the principles that must be employed in deliberation and, second, a legal system may stipulate what grounds are and what grounds are not legitimate grounds for the different treatment of persons or circumstances. So, for example, a legal system may stipulate that mere racial difference is (or is not) an acceptable ground for the different treatment of individuals in certain types of cases.

Within the scope of these limitations it still remains possible to speak of principled judicial decision-making. Our legal system has no privileged status. Not only are systems possible that differ from ours in content, but so also can principled decisions occur within the framework of such systems. For in such systems courts can function as "courts of law" and may embody in their procedures "the main constituent of the judicial process . . ."<sup>26</sup> Thus, when a legal system does make racial (or other) differences relevant, it is still possible for principled judicial decision to exist, so long as the requirements for principled decision are met within the terms of the law that the system lays down. Principled legal judgment is not so much a matter of content as it is of form. Neutrality and generality are to be found not in the content of the law but in its application or administration. Prin-

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25. WECHSLER 16.

26. *Id.* at 21.



cipled judicial decision-making is possible in a tyranny. This is worth stressing, if only because Professor Wechsler's ideas move within a liberal democratic context. But I should also suppose that if we range states along a scale—"ideal" democracy at one end and "ideal" tyranny at the other—there is a point of no return, a point at which the form and content of the tyranny become inseparable, making it impossible to speak of principled judicial judgment.<sup>27</sup>

A legal system, then, may broadly fix the starting-points of deliberation and the criteria of relevant distinctions. It is the lesson of American jurisprudence that this fixity has its limits and that a degree of discretion is inevitable. But we still demand that, so far as possible, courts be principled in their exercises of this discretion. This applies with greatest force to the Supreme Court when it has constitutional questions before it. Lower courts often have no choice once the higher courts have spoken. (One need only think of the different results in cases after *Brown v. Board of Educ.* had the Court affirmed the separate-but-equal doctrine in regard to public education.) But the Supreme Court, when ruling on constitutional issues, has no higher guide than the Constitution itself. Of course, there are times when "the relative compulsion of the language of the Constitution, of history and precedent" do combine to make the answer clear; but frequently they do not. Professor Wechsler maintains, and I agree, that the due process clauses ought to be read as "a compendious affirmation of the basic values of a free society . . . ."<sup>28</sup> Furthermore, it is possible to overstate the specificity of other provisions of the Bill of Rights addressed to more specific problems. They, too, must be read as "an affirmation of the special values they embody rather than as statements of a finite rule of law . . . ."<sup>29</sup> Constitutional interpretation by the Supreme Court, then, most closely approximates moral decision-making, and when it is principled it will rest "on reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result that is involved"<sup>30</sup> in the way outlined above.

I should now like to consider in detail some further points in connection with Professor Wechsler's exposition. But before I turn to Professor Wechsler's allusion to some opinions of Holmes as possible exemplars of principled judicial decision and examine some aspects of Professor Wechsler's appraisals of review, I think it important to make clear why the question that forms the subject of his paper is the same for the critics as it is for the Court.

27. It seems, again, that by contrast democratic states are the most moral, for not only must they adhere to the requirements of principled decision-making in the courts but also in the legislature. I shall not develop this point here, however, but simply point out that even in such case it is plain that there may be "partial" or "un-neutral" laws.

28. WECHSLER 24, 26.

29. *Ibid.* It is obvious that Professor Wechsler is no "strict constructionist."

30. *Id.* at 27.

The reason is quite simple. The ground rules for the *intelligent* discussion of any issue—and, as Professor Wechsler correctly indicates, what he says is true not only of a critique of the Court, but “applies whenever a determination is in question, a determination that it is essential to make either way”<sup>31</sup>—are exactly the same as the general requirements for principled decision-making. Consider for a moment what distinguishes *constructive* criticism from useless criticism, what distinguishes a discussion that is worthy of one’s participation from a discussion that is not, and the truth of this will be apparent. No criticism is worth listening to unless it is constructive to some degree. The contrast with this is criticism of the mere “I like it” or “I don’t like it” variety. Autobiographical remarks such as these are of interest only when it is important to know what someone’s preferences are. But they mark the end of discussion, not its beginning; they function as “conversation stoppers.” Discussion ends when we come to the bedrock of differences in preference, but it cannot begin there.<sup>32</sup> Constructive criticism and useful discussion can proceed only when reasons for a judgment are advanced that not only include but go beyond the case at hand.<sup>33</sup> If these reasons, or principles, are not ruled out *ab initio* as unacceptable (*e.g.*, in law when contrary principles are stipulated), then debate typically continues in the *reductio ad absurdum* manner. Would the critic treat such and such similar cases in the same way as he treats the instant case? If not, how does he distinguish them? Failing this, must he not reject the reason or principle on which his judgment rests? Just as a factual proposition is shown to be false if it implies a false statement, so also is a practical principle shown to be unacceptable if it leads to pragmatic inconsistencies, or when it would require treating some given case in a way in which *ex hypothesi* it may not be treated. Nothing that I have said in this paragraph is incompatible with the view that all our judgments rest ultimately on our preferences, and that differences in judgment rest on fundamental and perhaps ineradicable differences in preference.<sup>34</sup>

The utilization of the above type of *reductio* argument is well-illustrated by Mr. Justice Holmes’s dissent (his first as a member of the Court) in

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31. *Id.* at 16.

32. See BENTHAM, *op. cit. supra* note 19, at 6. Of course, even when this point is reached, the argument may continue over the *facts* of the issue. See note 24 *supra*.

33. I think that Professor Wechsler goes too far when he says that an attack upon a judgment of the Court involves the assertion that the reasons which prevailed with the tribunal are *irrelevant*. WECHSLER 16. The reasons may have been relevant but inconclusive.

34. It is often incorrectly thought that aesthetic evaluation, which seems most intimately and immediately bound up with our likes and dislikes, is an exception to the kind of principled decision which ought to apply to the courts and their critics. But that this is not so may be seen from the distinction we draw between good and bad art critics. The evaluations of the bad critic are always *ad hoc*, a mere expression of likes and dislikes. The evaluations of the good critic are constructive. He gives reasons for his judgment and in so doing shows how the work of art may be improved, even though he might not have the talent to do it better himself.

*Northern Sec. Co. v. United States*,<sup>35</sup> to which Professor Wechsler refers.<sup>36</sup> The question in this case was whether, under the Sherman Act, "it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies [Northern Pacific and Great Northern], if they form the corporation, and the corporation buys the stock."<sup>37</sup> A majority of the Court, emphasizing the power of Congress to regulate interstate commerce, held that such activity is unlawful, given the effect that such an arrangement is bound to have upon competition between the railroads. Holmes, in his brilliant way, proceeded to give the Court a lesson in statutory construction, in how "to read English intelligently."<sup>38</sup> His language sparkles with "neutrality." In this case, involving J. Pierpont Morgan and James J. Hill, Holmes wrote that "we must read the words before us [the Sherman Act] as if the question were whether two small exporting grocers should go to jail."<sup>39</sup> He rejected the argument of counsel for the Government as leading to the unacceptable conclusion that there is "no part of the conduct of life with which, on similar principles, Congress might not interfere. . . . Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."<sup>40</sup> The Government's principle must be rejected, for it would lead to treating a case in a way in which it may not be *ex hypothesi*. Driving home this point, he continues:

This act is construed by the government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court.<sup>41</sup>

Again, an unacceptable conclusion. Furthermore, Holmes writes: "If I am [wrong], then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the states, whether made after or before the act, if now continued, is a crime."<sup>42</sup> This also is too hard for Holmes to swallow, and when a principle leads to constitutionally impermissible conclusions it must be rejected. We see Holmes in this dissent playing the part of the critic, rejecting the argument of the Government and the judgment of the

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35. 193 U.S. 197, 400 (1904).

36. WECHSLER 33.

37. 193 U.S. at 401.

38. *Ibid.*

39. *Id.* at 402.

40. *Id.* at 403 & 402.

41. *Id.* at 403.

42. *Id.* at 410.

majority because in part they fail to adhere to the requirements for principled decision. It should be mentioned that it is one thing for the critic to show that some given decision is not principled and another to show that it is wrong. The superficial reader of Professor Wechsler's article is liable to get the impression that there is no difference between the two.

Perhaps one of the most difficult theoretical points in Professor Wechsler's paper concerns the place of values in principled judicial decision-making. I am not sure that I have understood his position on this or, if I follow it, that I agree with what he has to say. Before attacking this issue head-on, it is useful to consider an example provided by Holmes's dissent in the *Abrams* case,<sup>43</sup> to which, together with his dissent in *Gitlow*,<sup>44</sup> Professor Wechsler invidiously compares<sup>45</sup> the main opinion in *Sweezy v. New Hampshire*.<sup>46</sup>

It seems that for Holmes the crucial point in *Abrams* was that of intent. It is, he says,

too plain to be denied that [the leaflet urges] . . . curtailment of production of things necessary to the prosecution of the war . . . . But to make the conduct criminal, that statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.' It seems to me that no such intent is proved.<sup>47</sup>

Passing on to the question of the freedom of speech, Holmes argues that

it is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. . . . [B]y the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.<sup>48</sup>

Professor Wechsler, apparently conceding that Holmes's position is framed in terms of "neutral and general principles," queries in a footnote: "Is it possible, however, that persuasion to murder is only punishable constitutionally if the design is that the murder be committed 'forthwith'?"<sup>49</sup> This is instructive (aside from the common law point being made), for it shows that even what Professor Wechsler takes to be a "neutral principle" may be objectionable. It is important to keep in mind that Holmes regarded *Abrams* as dealing with the expression of political opinion, and, although stating that

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43. *Abrams v. United States*, 250 U.S. 616, 624 (1919).

44. *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

45. WECHSLER 35-36.

46. 354 U.S. 234 (1957).

47. 250 U.S. at 626.

48. *Id.* at 628 & 627.

49. WECHSLER 35-36 n.83.

"persecution for the expression of opinions seems to me perfectly logical,"<sup>50</sup> he believed that our Constitution opts for a particular value. This is the "theory of our Constitution," which is "an experiment, as all life is an experiment."<sup>51</sup> This "theory" is that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."<sup>52</sup> This is the root of the "clear and present danger" restriction.<sup>53</sup> Holmes, therefore, asserts that "while that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten . . . ."<sup>54</sup> To this should be added Holmes's dissenting remark in *Gitlow*: "If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>55</sup>

The *Abrams* dissent illustrates at least one way in which values enter into constitutional interpretation. It is important not to press too far his analogy between expression of opinion and persuasion to murder. Aside from the matter of intent, the essential problem *Abrams* poses is that of putting two values in the balance for the purpose of deciding the case. On the one side we have national security, which it is the legitimate function of government to protect, and on the other the "theory of our Constitution." It is not a question of Holmes's "choosing" these values. (I think that the use of the phrase "choosing a value" in legal writing is unfortunate.) The Constitution, so to speak, has chosen them, in Holmes's understanding. And he further takes it that the Constitution chooses to risk the "experiment" which the "theory of our Constitution" involves. He sees that risk as going as far as a "clear and present danger" to national security. It is not, as Judge Learned Hand implies, that these opinions "may prove innocuous." They may, in fact, be "destined to be accepted by the dominant forces of the community." It is, moreover, "perfectly logical" to suppress them. But this is not the "theory of our Constitution"; one can not maintain this "theory" *with all its attendant risks* and at the same time permit the suppression of opinion in the name of national security. Of course, there is a limit—that of "clear and present

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50. 250 U.S. at 630.

51. *Ibid.*

52. *Ibid.*

53. See HAND, THE BILL OF RIGHTS 58-59 (1958): "The only ground for this exception which I have ever heard is that during the interval between the provocation and its realization correctives may arise, and that it is better to accept the risk that they may not be sufficient than to suppress what, however guilty in itself, may prove innocuous." Did Homer nod in *Abrams*?

54. 250 U.S. at 630.

55. 268 U.S. at 673.

danger." To breach this limit, however, is to subvert the "theory," the value of freedom of expression, which the Constitution has chosen.

I am not here concerned with whether Holmes's reading of the "theory of our Constitution" is correct; I am sure that many constitutional lawyers would find it disputable. I am concerned, rather, with what it illustrates, namely, that constitutional interpretation does not occur within a vacuum of values. By this I do not simply mean that judges bring with them a personal set of values or that the determination of constitutional or other questions frequently reflects a "choice of values"; my meaning is, rather, that affirmations of various values are written into the Constitution, "values that must be given weight in legislation and administration at the risk of courting trouble in the courts."<sup>56</sup> The Court, then, cannot avoid taking these values into account in constitutional adjudication. To do otherwise would be to fail to adhere to the requirements for principled decision-making. These values supply *substantive* criteria of principled judgment. We are entitled to reject any principle of decision that, if acted upon, would lead to the frustrating of accepted values. But this is workable only when values are not in competition.

Is it possible to speak of principled judicial decision-making when more than one value is at stake, when it is impossible for a plurality of values to be fulfilled in equal measure? Certainly one would like to emphasize together with Professor Wechsler "the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values . . . ."<sup>57</sup> But what is that role? Certainly one would like to agree with him that the virtue or demerit in a judgment turns "entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . ."<sup>58</sup> But what is the test of adequacy? I cannot see much in the way of an answer to these questions in Professor Wechsler's lecture.

The above questions raise the most complicated problems in the analysis of legal reasoning. I fail to grasp Professor Wechsler's position if it consists in the statement that one ought to, or even can, supply "neutral principles" for "choosing" between competing values. I can, of course, choose between two competing values by reference to a third value which is more comprehensive or supreme, that is, when there is already an ordering of values. Assuming such an ordering, it seems to make sense to speak of "reasoned choice between competing values." Although I doubt it, perhaps this is precisely what Professor Wechsler is implying in his comment on the "preferred position" controversy when he says that it has virtue "insofar as it recognizes that some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained."<sup>59</sup> But it is

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56. WECHSLER 26.

57. *Id.* at 23.

58. *Id.* at 27.

59. *Id.* at 35.

difficult to see how the ordering itself is to be made on "neutral principles."

Perhaps, however, even lacking such an ordering of values, all is not lost for principled decision-making. Another brief glance at Holmes's dissent in *Abrams* will illustrate what I have in mind. Two values were involved in the deciding of this case—national security and freedom of expression—neither of which could be ignored. What Holmes did was to make his best judgment as to the point beyond which one cannot go if the value of national security is to be maintained, as he believed it must, when it competes with the value of free expression, which on his understanding of the Constitution ordinarily has precedence. That point is "clear and imminent danger," which now functions as a standard or criterion to be applied in situations when these two values are in competition. This standard, though clearly and eminently vague, will now function for him as a principle of decision in this and other cases of its type. We may apply to this principle the type of critical evaluation that I have heretofore adumbrated.

Thus, when, in deciding a case, a tribunal is faced with two competing values and there is no good reason to be advanced for preferring one value over another, so that the preference given to one value is entirely arbitrary, if you please, we may still require that the tribunal formulate a standard or criterion that shall function as a principle of decision in this and other cases of its type. This principle is general in the sense that it covers but also transcends the instant case. It is not, of course, inherently "neutral" in any sense, except that there may be neutrality in its application, *i.e.*, it may be applied in a principled way. Would the decision-maker apply this principle in such-and-such similar cases? If not, how does he distinguish the cases? Failing this, must he not reject the principle? What I have just said obtains not only in cases in which there are two competing values, but also, more broadly, in cases in which there are two (or more) countervailing considerations, *e.g.*, two conflicting principles, which must both be taken into account such that the presence of one of them does not in all cases rule out the applicability of the other. Granted that both such countervailing considerations have weight, the decision-maker is required to draw a line fixing their limits.

It seems to me that the aspect of principled decision I have just described is not so remote from what Professor Wechsler demands of the Court in his appraisal of judicial review. To this extent his position seems perfectly intelligible, although I confess my inability to understand him if he requires that the "choice of values" itself be made on "general and neutral principles." I am also uncertain that I understand how Professor Wechsler can demand that courts decide "on grounds of adequate neutrality and generality" and at the same time maintain that courts should decide "only the case they have before them."<sup>60</sup> There is, of course, an obvious sense in which a court *does*

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60. *Id.* at 21.

decide *only* the case that is before it. But if a tribunal is to be principled, what it must do in essence is to anticipate the kinds of criticism that might be made of its decision. It must attempt to explain away at least the more apparent inconsistencies. In doing this the tribunal, in effect, "decides" cases which are not before it. I think that we will see that this is precisely what Professor Wechsler is demanding in some of his appraisals of judicial review. Before turning to some phases of these appraisals, I should like to raise a question that I think is of importance for the subsequent discussion. I have argued that, in a case the resolution of which depends upon taking into account countervailing considerations, principled judgment requires that the decision-maker formulate a general criterion that shall serve as a principle of decision in cases of its type. Will this procedure always be wise? Are there not areas of the law, such as those involving problems of procedural due process, in which it may plausibly be argued that it is better to have each case come up for decision in its own right than to have the Court lay down in advance general principles of judgment? I shall come to this in a moment.

There is hardly any need to show in detail how Professor Wechsler's comments on some older cases illustrate the requirements of principled decision thus far presented. Were not, he asks, the principles which the Court affirmed "strikingly deficient in neutrality, sustaining, for example, national authority when it impinged adversely upon labor, as in the application of the Sherman Act, but not when it was sought to be employed in labor's aid?"<sup>61</sup> The deficiency in neutrality here must be that the Court failed to articulate a significant ground for such disparity of treatment. So also must we understand his remark that some decisions are now read "with eyes that disbelieve" in part because "the Court could not articulate an adequate analysis of the restrictions it imposed on Congress in favor of the states . . . ."<sup>62</sup> Professor Wechsler further speculates "whether there are any neutral principles that might have been employed to mark the limits of the commerce power of the Congress in terms more circumscribed than the virtual abandonment of limits in the principle that has prevailed."<sup>63</sup> I think it obvious that any such principles could be no more or less "neutral" than Holmes's criterion of "clear and present danger." The commerce power of Congress poses problems of federalism and cases involving the reach of the commerce power necessarily bring into play countervailing considerations. The neutrality of such limiting principles would not inhere *in* the principles, just as it does not inhere in the limiting principle of "clear and present danger," but rather, if at all, in the manner of applying them, *i.e.*, in principled application.

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61. *Id.* at 32.

62. *Ibid.*

63. *Id.* at 33.



## III. PRINCIPLED DECISION-MAKING AND CIVIL RIGHTS

We come finally to those cases that pose for Professor Wechsler the hardest test of his belief in principled adjudication, namely, those involving the white primary, racially restrictive covenants, and segregation in the public schools. The decisions in these cases, he believes, "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."<sup>64</sup> Yet he questions how far they rest on "neutral principles" and are, thus, entitled to approval in the only terms which he acknowledges to be relevant to a judicial decision.

The problems in the first two categories of cases arise under the prohibitions of the fourteenth or fifteenth amendments which have been held to reach not only explicit deprivation by statute but also action of the courts and of subordinate officials purporting to exert authority deriving from public office.<sup>65</sup> Although I do not find all of his ingenious solutions compelling, Professor Pollak has admirably discussed<sup>66</sup> the issues involved in such detail that it would be unprofitable to retrace this ground here. I propose, therefore, to limit myself to one point, and then conclude with a defense of the desegregation decision, arguing that it does exhibit characteristics of principled judgment, although the Court's opinion in *Brown v. Board of Educ.*<sup>67</sup> is not entirely satisfying.

The main issue presented by the primary and covenant cases concerns the notion of "state action." One supposes that the paradigm of "state action" in these areas would be a statute that explicitly discriminates on racial grounds. But as soon as we move away from this everything becomes less clear. May the Democratic Party of Texas, which is a "private" organization, exclude Negroes from its primaries? If a "private" party is free to enter into a restrictive covenant, may a state be charged with infringing the fourteenth amendment if its courts give effect to such an agreement? Professor Wechsler asks: "What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of law, or is it a sufficient answer there that the discrimination was the testator's and not the state's?"<sup>68</sup> If I understand Professor Wechsler's complaint, it is that the Court has failed to lay down, in the cases dealing with these issues,<sup>69</sup> a criterion of "state action," or of "unconstitutional state action," or of "discriminatory state action."<sup>70</sup> In these cases one is forced to

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64. *Id.* at 37.

65. *Id.* at 37-38, citing, *inter alia*, *Ex parte Virginia*, 100 U.S. 339, 347 (1880).

66. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

67. 347 U.S. 483 (1954).

68. WECHSLER 40.

69. Principally, *Smith v. Allwright*, 321 U.S. 649 (1944), and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

70. See the suggestive article of Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957).

take account of the countervailing considerations of "state" and "private" action. If a "private" party is by hypothesis free to discriminate, except when prohibited by law, at what point does such discrimination become invalid when it is enabled, permitted, or enforced by an organ of a state? As Professor Wechsler asks, what is the principle involved?

I suggested above that there might be areas of the law, such as procedural due process, in which it is inadvisable to lay down criteria or standards of the type under consideration here. There is an almost immeasurable variety of cases which could conceivably involve the notions of "state" and "private" action. In *Smith v. Allwright* the Court maintained that the discrimination practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary was "endorsed," "adopted," and "enforced" by the state. This conclusion was reached only after close attention to the *role* played by such primaries in the electoral process, rather than by an application of a general criterion.<sup>71</sup> Perhaps this, too, is an area in which it is best to proceed on a case-by-case basis, and the Court, in refusing to lay down a criterion, has chosen wisely.

But if it is proper for the Court to approach the problems of "state" and "private" action in this way, it is, nevertheless, not unfair to ask the Court to give some explanation for the apparent inconsistencies among the cases it has decided. If it is true that not every instance of judicial cognition of private discrimination is state action prohibited by the fourteenth amendment, can we distinguish those classes of cases in which it obtains from those in which it does not?<sup>72</sup> The requirements of principled decision impose such a task on the Court. In other words, the question whether the Court should refrain from laying down a criterion in cases of the sort I have mentioned really goes to the knotty issue of the *scope* of the criterion that the Court ought to give: how broadly, or how narrowly, should the principle be framed? This question is of great practical significance, for principles enunciated by higher courts inevitably affect decisions of lower courts. Moreover, an articulated principle stands as a commitment by the higher court itself with respect to future cases in which the fact situation may be slightly different. On the one hand, principles seem to have a way of fixating themselves in the mind of the decision-maker and impel him, in the next case, to go farther than he may really want. On the other hand, a narrowly formulated principle

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71. *Smith v. Allwright*, 321 U.S. 649 (1944); *cf.* *Terry v. Adams*, 345 U.S. 461 (1953). Professor Wechsler inquires whether the decisions in *Smith* and *Terry* mean that religious parties are proscribed, and whether such a proscription would not infringe rights protected by the first amendment. WECHSLER 40. My answer is that the first topic of consideration would be the role of such a party in the electoral process. If it plays the role of the Democratic Party or Jaybirds in Texas or the Democratic Party in a Louisiana locality, there is good reason for proscribing it. Are not the rights of members of other religious groups infringed in such a situation?

72. See Pollak, *supra* note 66, at 12-16.

might supply no guidance to a lower court. Of course, no one supposes that principled decision is an easy task. (Perhaps it is to just these issues that Professor Wechsler's remark that courts should decide "only the case they have before them"<sup>73</sup> is addressed.) The complexity of this problem is increased when we consider its relation to the doctrine of precedent; but I am not prepared to deal with these matters at this time.

The question of school desegregation hardly seems susceptible of judicial neutrality. It stirs even in Professor Wechsler the "deepest conflict" in testing his thesis.<sup>74</sup> Fortunately, the decision in *Brown* does not hinge on the slippery notions of "state" and "private" action, although they may become relevant in cases arising from devices adopted by states seeking to avoid the consequences of that decision. In order to determine whether and in what respects this case departs from the model of principled decision-making, which I take to be what is most comprehensible in Professor Wechsler's conception of "neutral principles," it will be useful to have before us the heart of the Court's opinion:

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. . . . Such an opportunity [education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.<sup>75</sup>

There are in the Court's argument five points to be noticed: (1) the focus is solely upon education—it is "in the field of public education" that "the 'separate but equal' doctrine has no place"; (2) it is taken as axiomatic, and there is no disputing it, that when a state undertakes a program of public

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73. WECHSLER 21.

74. *Id.* at 43.

75. 347 U.S. at 492-95.

education it must be available to all on equal terms; (What this means is the crucial point.) (3) segregation in education is constitutionally bad because it "generates a feeling of inferiority"; (4) "separate educational facilities are inherently unequal"; and (5) the issue is disposed of entirely on equal protection grounds.

Considering the focus of the opinion, Professor Wechsler seems entirely justified in his criticism of the Court's per curiam extension of the ruling to other public facilities in later cases.<sup>76</sup> But I think that one can explain this focus and that one may infer from the Court's actions that *Plessy v. Ferguson*<sup>77</sup> is in effect overruled "in form."<sup>78</sup>

The effects of segregation on Negro children and, in particular, whether segregation "generates a feeling of inferiority" are topics that have been widely discussed. The testimony of "modern authority" has been raked over the coals. Professor Black thinks that this testimony did no more than to demonstrate what is obvious to every sane man.<sup>79</sup> Professor Cahn believes that the Court made no more than a passing reference, "alluding to them graciously as 'modern authority.'"<sup>80</sup> He thinks that the belief that the Court's judgment was a result, either entirely or in major part, of the opinions of the social scientists is both erroneous and dangerous. Nor is Professor Wechsler without his doubts. "Much depended," he says, "on the question that the witness had in mind, which rarely was explicit." And this is not all. "[I]f the harm that segregation worked was relevant, what of the benefits that it entailed: sense of security, the absence of hostility? Were they irrelevant?"<sup>81</sup>

To me, what is least satisfying about the opinion in *Brown* is the unclarity of the relationship between the Court's judgment that segregated schools generate a feeling of inferiority and its judgment that separate educational facilities are "inherently unequal." Is the second meant to follow from the first? What then is the force of the word "inherently"? Although I agree that segregation does stigmatize Negroes with a badge of inferiority, and although I also tend to accept the argument of some that as a matter of fact "separate but equal" facilities are rarely equal, I find it hard, together with Professor Wechsler, to think that the decision really turned upon the facts.<sup>82</sup> But I would phrase this in a slightly different way: I do not think that the decision turned *merely* upon the Court's understanding of the facts; the element of principle plays a crucial role in the Court's reasoning.

Throughout one's reading of the opinion one must keep in mind the legal

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76. WECHSLER 31.

77. 163 U.S. 537 (1896).

78. *Contra*, HAND, *op. cit. supra* note 53, at 54.

79. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

80. Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 160 (1955).

81. WECHSLER 44-45.

82. *Id.* at 45.

position of segregated schools before the *Brown* decision, the import of the "separate but equal" doctrine. Under the fourteenth amendment, the pre-*Brown* doctrine was that the *only* requirement regarding public schools was that Negroes and whites may be treated in a separate manner so long as the schools in any given state were equal in facilities, etc., in that state. In other words, with *no need of any touch of a justification* it was permissible for a state to single out a group of individuals and educate them separately from other groups so long as there was equality of facilities, etc., apparently on the theory that no showing of injury, necessary to successfully challenging legislation on equal protection grounds, could be made. It is this *at the very least* which is no longer the legal position after *Brown*.

As I see it, the decision in *Brown* turns upon two separate points. First, that segregation in public schools is invalid because it is in principle a denial of equality: such schools are "inherently unequal." Second, that it is constitutionally bad because it generates a feeling of inferiority in the minority group, *i.e.*, the group not politically dominant.<sup>83</sup> The first point is directed toward the item mentioned above. It holds, no matter what the feelings are which are generated. Segregation, with or without equal facilities, taken by itself and without some justification for meting out a *different* treatment to equals under the law, is constitutionally bad. What is affirmed here is the *prima facie right* of Negroes to attend the same schools as whites; a right which they can be prevented from exercising only if some adequate justification can be given for so preventing them. Clearly, their race alone, under the fourteenth amendment, is certainly not sufficient as an adequate justification.

On the first point, then, I do not see how the Court could have validated segregated public schools, even granting equal facilities. The major premise of the decision is that when a state undertakes a program of public education it must be made available to all on equal terms. This proposition is really the individualization, for this case, of a more general one about state programs: they all must be made available to all on equal terms. So, if a state undertakes a program of home nursing care to poor, disabled persons, it, too, must be available to all on equal terms. (This is to be distinguished from another "more general" proposition that home nursing care must be made available to all irrespective of their economic status.) *Disparity of treatment* of equals must be justified by the discriminator if *he* is to be principled. Could the Court here have acknowledged such disparity of treatment—and enforced separation, even if "separate but equal," is just that—granted that Negroes have a legitimate claim to equal treatment under the fourteenth amendment?

As I reconstruct this aspect of the Court's reasoning, the equal protection and due process clauses of the fourteenth amendment are intimately

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83. Professor Wechsler's gloss. See *id.* at 45.

related—and are they so separate anyway? It is interesting to note that in *Bolling v. Sharpe*,<sup>84</sup> dealing with segregated schools in the District of Columbia, the Court arrived at the same result as *Brown* on fifth amendment due process grounds. Finally, in *Cooper v. Aaron* the Court makes its stand clear: “the right of a student not to be segregated *on racial grounds* in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.”<sup>85</sup> In sum, principled decision requires sameness of treatment in public education—unless some justification can be offered for the different treatment, and distinction of race *alone* is not an acceptable ground for permitting separate school facilities. This is implicit in the Court’s opinion in *Brown*, although that opinion leaves much to be desired.

The *onus probandi* of providing a justification for racially segregated public schools fell on the states that maintained such schools. There are, of course, justifications for racially segregated schools that could conceivably be offered. It could be argued that Negroes and whites differ significantly in native intellectual capacity, so that the purposes of education would be frustrated by integration. Such ploys ring a familiar bell, having been used by European countries to justify the domination of their colonies. But even if it were granted that this is true—which it is not—the measure of the sincerity of the discriminator would be whether he is prepared to maintain classes of Negroes and whites who possess a low-level of intelligence. It is fairly evident that this ploy amounts to little more than dodging the issue. It could, again, be argued that although Negroes *do* have the right to attend integrated schools, because under the fourteenth amendment race is not an acceptable ground of distinction, the very attempt to integrate the schools is so fraught with danger to peace that Negroes ought to be prevented from exercising their right. But the weight of this argument would vary from community to community, and at best it only goes to the issue of how quickly integration ought to be instituted. I think that although the Court required (in the second *Brown* decision)<sup>86</sup> that it be done with all “deliberate speed,” the Court did, nevertheless, partially acknowledge some merit in this argument in recognizing that the variations in local conditions did affect the rate of integration. It is true that in *Cooper*, in its instructions to the district

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84. 347 U.S. 497 (1953). The permissibility of the separation of children by “normal geographic school districting” is implied in the Court’s order handed down when the segregation cases were assigned in 1953 for reargument. *Brown v. Board of Educ.*, 345 U.S. 972, 973 (1953). Interestingly, this is not mentioned in the subsequent opinions. I am not certain as to how this really does affect those cases in which a *de facto* segregation (as distinct from an “enforced separation”) results.

85. 358 U.S. 1, 19 (1958). (Emphasis added.) See generally the hindsight opinion of Professor Pollak in which he refers to the “comprehensive standards which the Fourteenth Amendment imposes on all state activity.” Pollak, *supra* note 66, at 24-30.

86. 349 U.S. 294 (1955).

courts,<sup>87</sup> the Court excluded "hostility to racial desegregation" as a relevant factor from a district court's consideration regarding the rate of desegregation. But this, I believe, wisely reflected the Court's realistic view that to recognize hostility to desegregation as a ground for delay could only result in a permanent deprivation of the right of Negro children in this context.

It is worth noting that the two examples given above as possible justifications for retaining segregated schools differ in a significant respect. The first makes reference to something within the sphere of education itself, while the second refers to some governmental objective outside of education as such. These represent two different forms of justification of exceptions to principle, but I shall not attempt to explore this any further here.

This brings us to the second aspect of the *Brown* decision. Not only was the Court convinced as a matter of principle that Negroes have a prima facie right to sameness of treatment in public education, but the Court was also convinced that Negroes are positively harmed by such discrimination. This bodes ill for any conceivable justification for retaining enforced segregation. Obviously this fact weighed heavily in the minds of the members of the Court as they listened to and read the arguments put forth by counsel of states that practiced racial segregation. Even without it only the weightiest considerations could have overridden the right of Negroes to attend integrated schools; how much more so with it! Thus, even if one grants the benefits that Professor Wechsler alleges segregation might have entailed (sense of security and absence of hostility),<sup>88</sup> granting also the harms, the Court would have been hard put to see much merit in the purported justifications for segregation. Segregated schools are at best a mixed blessing to Negroes, and it is not clear that their virtues overbalance the vices to such an extent that, excluding other considerations, the right which Negroes have in principle ought to be denied them.<sup>89</sup>

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87. "[A] District Court, after analysis of the relevant factors (which of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children." 358 U.S. at 7. It would naturally be self-defeating, in ordinary situations, to allow opposition to a principle to be a ground for making an exception to the principle.

88. WECHSLER 45.

89. I am not sure where this leaves the enforced separation of the sexes. Can some justification for it be found? An interesting area in which race and sex may be compared is that relating to juries. The Supreme Court has reversed the convictions of some Negroes when it was shown that the given state practiced a discriminatory racial policy in the selection of jurors. *Eubanks v. Louisiana*, 356 U.S. 584 (1958). In a recent case, *Hoyt v. Florida*, 368 U.S. 57 (1961), a woman who was convicted by an all-male jury of the baseball bat murder of her husband appealed on the ground that "such jury was the product of a state jury statute which works an unconstitutional exclusion of women from jury service." *Id.* at 58. Under that statute women are not required to serve on juries; they are permitted, however, to volunteer for service. But this was held not to be a purposeful or arbitrary discrimination. Writing for the Court, Mr. Justice Harlan said:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home

Professor Wechsler suggests another approach to the issue of segregation, and I shall conclude my remarks with a comment upon it.

For me [he says], assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved. . . .

But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.<sup>90</sup>

With all respect to Professor Wechsler, I do not see how one can say that the question "is not one of discrimination *at all*." Discrimination is certainly no less relevant than the freedom of association. Principled decision-making requires that the different treatment of equals be justified, and the *onus probandi* falls on the discriminator. As I see it, Professor Wechsler's question really comes down to this: is the "evil" of the imposition of association on those who wish to avoid it sufficient to justify the different, and hence unequal, treatment of equals? Put this way, I suggest that a better constitutional case can be made for the negative answer. But in any event I should like to have more instruction on what kind of constitutionally protected right the freedom of association is. As far as I am aware it is no more than the right of individuals to combine for a common (legal) end,<sup>91</sup> which seems irrelevant to the question of segregated use of public facilities, assuming them to be equal. Moreover, how far can we extend the claim of those who wish to avoid an association that is unpleasant to them? Could this not lead to the invalidation of any form of compulsory education?

These remarks are the words of a friendly critic. I accept, in the only way I can understand it, Professor Wechsler's ideal of judicial decision-making. And it is important to recognize that it is an ideal that, as an ideal, is no less valid for its being so rarely realized in practice—if such be the case.

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and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved of the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

*Id.* at 60-61. Perhaps this suggests the line of reasoning that would justify (for it clearly needs justification) the permissibility of the *enforced* separation of the sexes in schools.

90. WECHSLER 46-47.

91. See *NAACP v. Alabama*, 357 U.S. 449 (1958).